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No. 88-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CUDAHY COMPANY and GENERAL HOST CORPORATION,
Petitioners,

v.

CECIL W. MILLER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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Respondents, in their opposition, do not seriously contend that this petition does not raise fundamental and recurring constitutional questions worthy of review by this Court. Indeed, respondents do not—and could not—dispute that the issues relating to constitutional limits on punitive damages are related to the issues already before the Court in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, No. 88-556, and therefore, consistent with this Court's customary practice in such situations, the proper disposition of this case is, at the very least, to hold this petition pending the outcome of *Browning-Ferris.*

1. Respondents contend that certiorari should be denied because "any more delay in the disposition of this

case would be unfairly prejudicial to the plaintiffs." Brief in Opp., 9-10. But respondents do not explain what "unfair prejudice" they will suffer if the petition is held. Because the judgment is fully secured by a supersedeas bond and respondents are earning interest on their judgment, there is no basis (or authority) for the proposition that the time required for this Court to review a judgment gives rise to "prejudice" to the prevailing party below. There is no reason to deny review, if otherwise warranted, simply because respondents would rather execute on the existing judgment today rather than risk review by this Court.

2. Respondents state that "petitioners' constitutional claims were not properly presented to the courts below and are not properly before this Court." Brief in Opp. 4. In fact, the central issue in the petition—whether the Due Process Clause or the Excessive Fines Clause places any limits on the otherwise unrestrained discretion of the district court to award punitive damages—was specifically raised in, and addressed by, the Tenth Circuit and therefore is appropriate for review by this Court. The court of appeals rejected petitioners' argument that the damage award was "unconstitutional" because of the absence of any "limits on the amounts of such awards" on the ground that petitioners' have "cited no persuasive federal constitutional authority to support their argument." Pet. App. 19a.[1]

With respect to the separate constitutional claim involving compensatory damages, petitioners argued on rehearing that the damage rule adopted by the courts below

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[1] Petitioners reiterated their due process and excessive fines arguments at the rehearing stage in the Tenth Circuit. *See* Pet. for Rehearing, 9-10 ("Punitive damages of the magnitude and quality involved in this case violate both the Fifth and Fourteenth Amendments' prohibitions against deprivations of property without due process of law and the Eighth Amendment's prohibition against excessive fines").

"would violate both the Takings and Substantive Due Process Clauses of the Fifth and Fourteenth Amendments." Pet. for Rehearing, 8. The Tenth Circuit's order recited that the petition for rehearing, including this issue, was considered on "the merits," and rehearing was denied. Thus, respondents' suggestion that the constitutional issues at stake were "neither pleaded, argued nor briefed in the lower courts" (Brief in Opp. 6) simply is incorrect: both constitutional claims were raised in, and ruled upon by, the court of appeals. See *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980) (Court may consider "important, recurring issues" even when "not presented below").

3. With respect to the merits or the importance of the constitutional claims, respondents do little more than offer a truncated summary of the facts and declare, *ipse dixit*, that "there simply are no constitutional issues for this court to inquire into." Brief in Opp. 7; see *id.* at 8.[2] For example, respondents do not even address petitioners' argument that imposition of the award, in the circumstances of this case, violates "notions of proportionality between the punished activities and the penalty imposed." Pet. 17 (citing *Solem* v. *Helm*, 463 U.S. 227 (1983)).[3] Rather, in response to the argument that the

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[2] Instead of addressing the legal issues, respondents focus on specific facts. For example, respondents *twice* (in a ten page brief) quote at length from the 1984 district court opinion a passage to the effect that *American Salt's* president responded in kind to respondent Miller's "threatened legal action." Pet. App. 150. Accepting this hearsay statement at face value (as did the district court), it nevertheless fails to respond to petitioners' fundamental contention that the damage award against General Host Corporation is completely disproportionate to any showing of misconduct by General Host itself. Pet. 6 n.8, 7-8, 11 n.14.

[3] One particular aspect of the "arbitrariness" of the punitive damages award was the absence of any limits on how far back in history the fact finder was able to look in order to determine liability for punitive damages. *See* Pet. 11 n.14, 13 n.16. Thus, the

Eighth Amendment imposes limits on punitive damages, respondents merely assert that the numerical proportion of actual to punitive damages (1 to 3) was not "arbitrary or excessive" and was therefore "clearly constitutional." Brief in Opp. 7.[4]

Similarly, in response to petitioners' suggestion that this case presents issues—in particular, a challenge to punitive damages as a violation of due process—related to, but not raised in, the petition in *Browning-Ferris*, respondents argue that *Browning-Ferris* is distinguishable because (1) the numerical ratio of punitive to compensatory damages in *Browning-Ferris* was higher than it is in this case; and (2) *Browning-Ferris* was a jury trial and this case was not. Brief in Opp. 9.[5] Respondents' arguments are simply irrelevant to petitioners' claim that the "lack of sufficient standards governing punitive damages awards . . . violates the Due Process

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award in this case could only be imposed by employing contemporary standards of environmental practice to conduct that took place many years before—long before petitioner General Host acquired Cudahy. By invoking unrealistic standards to justify enormous punitive awards, the decision below significantly discourages acquisitions and makes abandonment, rather than clean-up, the only practical means to terminate the extraordinary punitive liabilities which can attach to acquired facilities that have been a source of pollution.

[4] Respondents also did not dispute that the federal district court's judgment that punitive damages were appropriate was in direct contradiction to the policy judgment of the Kansas legislative and executive branches. Pet. 7-8 n.11.

[5] It is impossible to know whether holding this petition for *Browning-Ferris* would "serve no purpose," as respondents' contend, until this Court announces the holding in *Browning-Ferris*. The Tenth Circuit rejected petitioners' Eighth Amendment argument because of an absence of "persuasive federal constitutional authority" (Pet. App. 19a) and petitioners ask that, at the very least, the Tenth Circuit be allowed to consider this case in light of *Browning-Ferris*, if that is appropriate.

Clause." Pet. 12 (*quoting Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986)).[6]

Petitioners also contended that the imposition of damages (for harm to the groundwater beneath respondents' land) that far exceeds the undisputed value of the land—and which leaves open the potential for continuing biennial damage awards—violates the Takings and Due Process Clauses. Respondents merely assert that such arguments are "meritless." Brief in Opp. 8. Petitioners explained that the issue is novel, but that is because the damages formula adopted by the courts below gives rise to a situation where "compensatory" damages bear no rational relation to the harm suffered by the respondents. See *Nollan* v. *California Coastal Comm'n*, 107 S.Ct. 3141 (1987). Respondents do not dispute petitioners' claim that "the lower courts' judgments have effectively converted respondents' farmlands into a gold mine" (Pet. 21); nor do they contest that the decision below potentially gives rise to additional damage awards, every two years, for most of the next century. Pet. 10.

Finally, respondents, by their silence, effectively concede that the award in this case will create a significant disincentive for manufacturers in the Tenth Circuit to undertake environmental clean-up efforts. For that reason alone, review of the compensatory damage award is warranted.

At bottom, respondents' Brief in Opposition does nothing to undermine petitioners' showing that this case presents fundamental and recurring questions of federal

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[6] Respondents simply miss the point of petitioners' due process argument; they dismiss that argument as a procedural issue involving "a meaningful opportunity to be heard." Brief in Opp. 7. In fact, petitioners' argument has nothing to do with procedure; rather, petitioners contended that the "wholly standardless discretion" of a trier of fact to impose punitive damages "appears inconsistent with due process." Pet. 12 (*quoting Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S.Ct. 1645 (1988)).

constitutional law concerning what, if any, rational limits must be imposed upon awards of punitive and compensatory damages. Moreover, respondents do not, and cannot, dispute that the decision below should have a long-standing and detrimental impact that extends far beyond the parties. Given the importance of the issues and the starkness of the constitutional claims in the circumstances of this case, the questions presented clearly are worthy of review by this Court.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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